ORIGINAL

IN THE SUPREME COURT
OF THE UNITED STATES

No. 90-7469

October Term, 1990

DONALD HENRY GASKINS,

Petitioner,

versus

KENNETH D. MCKELLAR, WARDEN,
SOUTH CAROLINA DEPARTMENT OF
CORRECTIONS, AND THE
ATTORNEY GENERAL OF SOUTH
CAROLINA,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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PETITIONER'S QUESTIONS PRESENTED

1. Did this Court's per curiam decision in Cage v. Louisiana, which disapproved of reasonable doubt instructions materially identical to those given in this case, announce a "new rule" of criminal procedure inapplicable in a habeas corpus proceeding?

2. Whether the definition of "reasonable doubt" employed by the trial court during his charge lessened the state's burden of proof in violation of the Fourteenth Amendment and the due process principles of In re Winship and Cage v. Louisiana?

3. Whether the state's admission of evidence that petitioner had previously been sentenced to death, and information regarding other plea bargains petitioner had entered into, coupled with the trial court's jury instructions, violated the Eighth and Fourteenth Amendments?

4. Whether a constitutionally impermissible burden shifting instruction regarding implied malice was harmless beyond a reasonable doubt?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

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The Respondents hereby make a Brief in Opposition to the Petition for a Writ of Certiorari requesting this Court to deny the writ. The Respondents would respectfully show this Court the following:

CITATION TO OPINIONS BELOW

Petitioner was convicted of murder and subsequently sentenced to death on March 26, 1983. The convictions and sentence were affirmed on direct appeal by the South Carolina Supreme Court. State v. Gaskins, 284 S.C. 105, 326 S.E.2d 132, cert. denied, 471 U.S. 1120 (1985).

Petitioner filed an Application for Post Conviction Relief in the Richland County, South Carolina, Court of Common Pleas on August 6, 1985. J.A.[1] 651. An evidentiary hearing was held on March 21, 1986, and relief was denied on June 6, 1986. J.A. 723-876; 878. The South Carolina Supreme Court denied Petitioner's Petition for Writ of Certiorari on January 7, 1987, as did the United States Supreme Court. Gaskins v. South Carolina, 482 U.S. 909 (1987).

A Petition for a Writ of Habeas Corpus was filed in the United States District Court for the District of South Carolina on August 11, 1987. The District Court referred the case to Magistrate Charles W. Gambrell, who, on January 27, 1989, recommended that the District Court dismiss the Petition. J.A. 1070-1200. The District Court entered summary judgment for the Respondents on August 2, 1989. J.A. 1312-1330. Petitioner filed a Motion to Alter or Amend the Judgment, pursuant to F.R.C.P. 59(e), on August 11, 1989. J.A. 1332. The Motion was denied on August 28, 1989. J.A. 1350. Petitioner filed a timely Notice of Appeal on September 26, 1989. J.A. 1367. The District Court granted a Certificate of Probable Cause to Appeal on October 2, 1989. On October 15, 1990, the District Court's Order was affirmed by the United States Court of Appeals for the Fourth Circuit. Gaskins v. McKellar, 916 F.2d 941 (4th Cir. 1990). Petitioner's Application for Rehearing with

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[1] "J.A." refers to the joint appendix filed in the United States Court of Appeals for the Fourth Circuit in connection with petitioner's appeal.

Suggestion for Rehearing En Banc was denied by the Fourth Circuit on November 16, 1990.

JURISDICTION

The Order of the United States Court of Appeals for the Fourth Circuit denying the Petition for Rehearing with Suggestion for Rehearing En Banc was entered November 16, 1990. This Court's jurisdiction is invoked pursuant to 28 U.S.C. Section 1257(3), Petitioner having asserted below and asserting herein a deprivation of rights secured by the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner's case involves the Eighth Amendment to the United States Constitution which reads as follows:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

This case also involves Section One of the Fourteenth Amendment which states in part:

> No state shall ... deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner, Donald Henry Gaskins, whose nickname is "Pee Wee," was serving ten life sentences, nine for murder and one for burglary, when he was charged with the murder of a fellow prisoner, Rudolph Tyner, on Sunday, September 12, 1982. Tyner had been sentenced to die for killing a Mr. and Mrs. Moon after Tyner and an accomplice

robbed their store on March 18, 1978. When Tyner was killed (by an explosion which went off in his cell around 4:45 P.M., on the day he was injured), he was housed in what prison officials and inmates referred to in the records as "death row," which was located in a building named Cell Block Two ("CB-2") which itself was located inside Central Correctional Institution ("CCI") of the South Carolina Department of Corrections ("SCDC") in Columbia. In addition to housing death row inmates such as Tyner, CB-2 also contained inmates detained for mental evaluations, inmates serving administrative sentences for disciplinary violations, inmates in segregated confinement who were under investigation, and inmates in protective custody. Despite his ten life sentences, Petitioner Gaskins was not detained all day in a locked cell (except when locked with his own padlock), for he was assigned as "the building man" to make electrical repairs, appliance repairs (television sets and radios), plumbing repairs, and whatever other maintenance jobs that lay within his particular expertise. As the building man, Gaskins had pretty much of a free run of CB-2 from early each morning until evening lock-down occurred after the evening meal had been served and dirty food trays had been taken out of the building.

Mr. and Mrs. Moon, Rudolph Tyner's murder victims, were survived by a daughter and a stepson, Tony Cimo. Cimo, who lived in or near Horry County (well over a hundred miles

from Columbia), was both grief stricken and bitter because of the killing of his parents by Tyner, and he initiated discussions with an acquaintance, Jack Martin, who also lived in Horry County, about his (Cimo's) desire to have Tyner killed inside prison. Either Cimo or Martin knew an SCDC inmate, Gerald McCormick (called "Pop" by fellow inmates), who was in CB-2 until mid-August of 1982, and who knew both Petitioner Gaskins and Rudolph Tyner. Although McCormick did not testify in the Petitioner's trial for the murder of Tyner, the trial record makes it clear that McCormick put Petitioner Gaskins in touch with Cimo and Martin, and Gaskins thereafter made numerous collect telephone calls to either Cimo or Martin, or both, from telephones in CB-2 that were available to inmates. The Petitioner, who sometimes recorded calls he made for inmates to their loved ones so the inmates could replay the records, recorded some of the calls he made to Martin or to Cimo, and these records revealed starkly that the Petitioner planned to rig an explosive device to kill Tyner for Cimo after repeated efforts by the Petitioner to kill Tyner by poison had failed. Transcripts of one of these calls to Cimo and two to Martin appear at Tr. 4493-4498, 4499-4504, and 4505-4524.

The prosecution's evidence showed that the Petitioner kept numereus tools, wire, and television and radio parts in his cell. He arranged for Cimo to send him either a partial stick of dynamite, or some plastic explosive, with

a detonator to ignite the explosive material. The Petitioner, in the tape records, found in his possession after Tyner's death, explained how he planned to use the explosive to kill Tyner, rather than continue repeated unsuccessful attempts to poison him. James Arthur Brown, who was a "tier man" in CB-2, testified that shortly after the afternoon meal had been served on September 12, 1982, Petitioner Gaskins asked him to deliver an article to Tyner, described to Brown by Gaskins as a speaker device Tyner could use to communicate with Gaskins rather than to have to shout through a vent when Tyner wanted Gaskins to do something for him. Brown said Gaskins asked him to tell Tyner the wire needed to plug in the speaker was sticking through the bottom vent of his (Tyner's) cell, and that Tyner would know what to do with the wire. Brown testified that he delivered the speaker-like device and the message to Tyner, and then advised Gaskins, who said "O.K." After a few minutes, Brown heard the sound of a loud explosion. He went into the Petitioner's cell and saw Gaskins pulling a wire into his cell through a vent beneath the sink. Brown said Gaskins told him he would give him a couple of hundred dollars if he would keep his mouth shut, and then walked out to mingle with other CB-2 inmates who were looking for the site of the explosion.

There was a great deal of conflicting testimony about Petitioner Gaskins' whereabouts immediately after the

explosion was heard. Gaskins himself did not take the stand, but his attorneys called numerous inmates who were in CB-2 on September 12, 1982. As to be expected, the testimony was in conflict, but it is clear enough that the jury credited Brown's version of the circumstances which occurred just before and immediately after the explosion. The "workouts" started looking for the site of the loud noise, and two inmates called out to an officer in CB-2 when the fatally wounded Tyner was found sprawled in his cell. Tyner was taken to a prison infirmary where he died not long after the explosion. A pathologist, Dr. Edward W. Catalano (Tr. 3356-3372), said Tyner's death was "relatively quick" after he was injured, that extensive damage to Tyner's brain had been caused by the explosion, and that "severe central nervous system trauma" was the cause of death. The pathologist said on cross-examination that he never looked for medical signs that Tyner had been give poison, as the prosecution contended.

The jury convicted the Petitioner of murder. A penalty phase was held to determine the appropriate penalty. Although Petitioner Gaskins elected to not testify in either phase of his trial, he did avail himself of the right to make a closing argument to the jury in the sentencing phase of the trial. In his closing argument (Tr. pp. 4384-4391), Gaskins renounced as untrue several admissions he made in his four-day confession which was the principal topic of the

testimony of former Solicitor Summerford. He contended, in effect, that he only confessed because he was not aware the State could not have sought the death penalty then, but he admitted he was guilty of "some" of the earlier homicides, and that he was also guilty "of participating in" a plot to kill Rudolph Tyner, but he told the jury he was not involved in "the final preparations" to kill the already condemned man. (Tr. p. 4390). The jury sentenced Gaskins to death.

In the direct appeal of his conviction and death sentence, Gaskins preserved fifty-six exceptions for possible briefing and argument to the South Carolina Supreme Court. (Tr. pp. 4602-4618). However, twenty-seven of the exceptions were apparently abandoned, and the remaining twenty-nine exceptions were incorporated into the nineteen questions argued in the Brief of Appellant, and in the oral argument of the direct appeal. The Supreme Court denied the appeal on January 22, 1985. State v. Gaskins,, supra.

HOW THE FEDERAL QUESTIONS WERE DECIDED BELOW

The panel opinion of the Court of Appeals for the Fourth Circuit held that the "substantial-doubt portion of the [reasonable doubt] instruction did not rise to the level of a due process violation." Gaskins v. McKellar, 916 F.2d 941, 952 (4th Cir. 1990). As to the alleged Caldwell v. Mississippi, 472 U.S. 320 (1985), violation, which occurred when the state introduced evidence of Petitioner's previously vacated death penalty in 1975 and the trial court's use

of the word "recommendation," the Court of Appeals concluded that "this evidence and the judge's statement 'had no effect on the sentencing decision.'" Gaskins, 916 F.2d at 953 (quoting Caldwell v. Mississippi, 472 U.S. at 341). The Court of Appeals' Opinion did note that

> Nowhere in this case did anyone imply that the jury's recommendation was nonbinding. ... [U]nder the circumstances, we are satisfied that the jury was properly aware of its sentencing responsibilities.

Gaskins, 916 F.2d at 953. Finally, the Court of Appeals agreed that the malice instruction given at Petitioner's trial constituted a burden shifting instruction, but concluded that any error was harmless beyond a reasonable doubt. Id. at 952.

REASONS WHY CERTIORARI SHOULD BE DENIED

I. The trial court's instruction on reasonable doubt viewed in its entirety did not deprive the Petitioner of Due Process.

In his Petition, Gaskins seeks to have this Court grant certiorari to consider in a federal habeas corpus setting the standard jury instruction in South Carolina on reasonable doubt in which review has been consistently denied by the state court and this Court on many prior occasions. This review is sought despite the fact that the Fourth Circuit applied the appropriate standard of review for jury instructions in a habeas corpus setting wherein it concluded that the instruction is not likely to mislead the

jury into finding no reasonable doubt when in fact there was some. Gaskins v. McKellar, 916 F.2d 941, 954-955 (4th Cir. 1990). For the reasons set forth below, we submit that both the District Court and Court of Appeals properly denied habeas corpus relief in this matter and further review in certiorari is not warranted.

Challenges to jury instructions should not be viewed in artificial isolation, but must be viewed in the context of the overall charge in a habeas corpus proceeding. Cupp v. Naughten, 414 U.S. 141, 146 (1973); Francis v. Franklin, 471 U.S. 307 (1985). On collateral review of a state conviction, the role of the reviewing court is limited and the inquiry is narrow. Smith v. Bordenkircher, 718 F.2d 1273, 1276 (4th Cir. 1983). More precisely, the question in a habeas corpus proceeding is "whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process," not merely whether "the instruction is undesirable, erroneous or even universally condemned." Cupp v. Naughten, supra, 414 U.S. at 146-47; Henderson v. Kibbe, 431 U.S. 145, 154 (1977); Cooper v. North Carolina, 702 F.2d 481, 483 (4th Cir. 1983). Stated another way, "the burden of demonstrating that an erroneous instruction was so prejudicial that it will support a collateral attack is even greater than the showing required to establish plain error on direct appeal." Henderson v. Kibbe, supra, 431 U.S. at 154.

Recently, the Court addressed the legal standard for reviewing jury instructions in a direct appeal proceeding in Boyde v. California, ___U.S.___, 110 S.Ct. 1190 (1990). In Boyde, the Court concluded that where an instruction is ambiguous and subject to an erroneous interpretation "the proper inquiry in such a case is whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." 110 S.Ct. at 1198. Of pertinent importance to the issues, the Court stated as follows:

> This 'reasonable likelihood' standard, we think, better accommodates the concerns of finality and accuracy than does a standard which makes the inquiry dependent on how a single hypothetical 'reasonable' juror could or might have interpreted the instruction. There is, of course, a strong policy in favor of accurate determination of the appropriate sentence in a capital case, but there is an equally strong policy against retrials years after the first trial where the claimed error amounts to no more than speculation. Jurors do not sit in solitary isolation booths parsing instructions for subtle shades of meaning in the same way that lawyers might. Differences among them in interpretation of instructions may be thrashed out in the deliberative process, with commonsense understanding of the instructions in the light of all that has taken place at the trial likely to prevail over technical hairsplitting.

Id.

Respondents submit that the challenged instructions on reasonable doubt did not create a "reasonable likelihood" that the jury understood the instructions in an unconstitutional manner. Boyde, supra. Francis v. Franklin, supra. It is clear from the entire charge considered in context that a reasonable jury could not have misunderstood the nature and function of the concept of reasonable doubt.

On October 15, 1990, the United States Court of Appeals for the Fourth Circuit entered its opinion in which it relied upon its long established precedent of Smith v. Bordenkircher, 718 F.2d 1273 (4th Cir. 1983), and that of this Court in Taylor v. Kentucky, 436 U.S. 478 (1978), to deny habeas corpus relief. The claim concerning the "reasonable doubt" instruction had not been presented in the state courts, but the District Court had chosen to review it under Granberry v. Greer, 481 U.S. 129 (1987), over Respondent's objection, because the "matter was lacking in merit as a colorable constitutional claim." (J.A. pp. 1113-1122, 1315-1316). In the appeal to the Fourth Circuit, the Petitioner claimed that the trial judge's definition of reasonable doubt as " a doubt for which you can give a reason, it is a substantial doubt," relieved the State of its burden of proof as required by In Re Winship, 397 U.S. 358 (1970). The Fourth Circuit addressed the issue as follows:

> Viewed in the context of the entire record of trial, the substantial doubt portion of the instruction did not rise to the level of a due process violation. First, the trial court employed the instruction to set in contrast "some imaginary doubt or some slight doubt or some fanciful doubt that you might have." (J.A. at 439). The trial judge's use of the term substantial doubt was, in context of the entire instruction, more accurate than when viewed in artificial isolation, and was

> not "likely to 'mislead the jury into finding no reasonable doubt when in fact there was some.'" Smith v. Bordenkircher, 718 F.2d at 1277. Moreover, the trial court flatly instructed the jury that "the proof offered by the state must exclude every other reasonable hypothesis except the guilt of the accused and must satisfy you beyond a reasonable doubt." (J.A. at 444). This instruction further neutralized any negative effects of the substantial doubt instruction. See Bordenkircher, 718 F.2d at 1277.
>
> We are not prepared to say that this instruction, even in combination with the substantial doubt instruction, "so infected the entire trial that the resulting conviction violates due process." Id. at 1276.

916 F.2d at 952-953. The Court concluded that the language here was not likely to mislead the jury into finding no reasonable doubt when in fact there was some.

Recently in U.S. v. Nolasco, ___F.2d___, 1991 Westlaw 17288 (9th Cir. February 15, 1991), the appellate court discussed definitions of reasonable doubt and their impact upon a jury. The requirement that a criminal charge must be proven beyond a reasonable doubt is "indispensable, for it 'impresses on the trier of fact the necessity of reaching a subjective state of 'certitude of the facts in issue.'" In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 1072, 25 L.Ed.2d 368 (1970). The reasonable doubt standard gives substance to the presumption of innocence and instills confidence in the community that the innocent will not be condemned. Id. at 363-64, 90 S.Ct. at 1072-73. A defendant in a criminal case therefore has a constitutional right to have the jury instructed that guilt must be established

beyond a reasonable doubt. United States v. Rhodes, 713 F.2d 463, 471 (9th Cir.), cert. denied, 464 U.S. 1012 (1983).

Because of the importance of understanding precisely what the words "reasonable doubt" mean as a legal standard, counsel for criminal defendants frequently request a further definition of those terms. At a minimum, the instructions to the jury must "as a whole, fairly and accurately convey the meaning of reasonable doubt." United States v. Clabaugh, 589 F.2d 1019, 1022 (9th Cir. 1979). Courts have struggled to articulate a clear and unambiguous definition of the term "reasonable doubt." Several circuits have held that the phrase is one of common usage and acceptance, requiring no definition beyond the language itself. See United States v. Olmstead, 832 F.2d 642, 646 (1st Cir. 1987), cert. denied, 486 U.S. 1009, 108 S.Ct. 1739, 100 L.Ed.2d 202 (1988); United States v. Lawson, 507 F.2d 433, 442-43 (7th Cir. 1974), cert. denied, 420 U.S. 1004, 95 S.Ct. 1446, 43 L.Ed.2d 762 (1975); Murphy v. Holland, 776 F.2d 470, 475 (4th Cir. 1985) (term has "self-evident meaning comprehensible to the lay juror"), vacated on other grounds, 475 U.S. 1138, 106 S.Ct. 1787, 90 L.Ed.2d 334 (1986). The Supreme Court has noted that "[a]ttempts to explain the term 'reasonable doubt' do not usually result in making it any clearer to the minds of the jury." Holland v. United States, 348 U.S. 121, 140, 75 S.Ct. 127, 138, 99

L.Ed. 150 (1954) (quoting Miles v. United States, 103 U.S. 304, 312, 26 L.Ed. 481 (1880). The Holland court nevertheless suggested that an acceptable definition would define reasonable doubt as "the kind of doubt that would make a person hesitate to act." Id. The challenge confronting a court that would define reasonable doubt is to avoid language that may "mislead the jury into finding no reasonable doubt when in fact there was some." Id.

The Petitioner now challenges two isolated portions (which counsel never objected to during the trial):

> I charge you first of all that it's a cardinal rule of law that everyone who is charged with a crime is presumed to be innocent until proven guilty by the state beyond a reasonable doubt. No defendant has to prove his own innocence. He is presumed innocent. And the state has the entire burden of proving to you beyond a reasonable doubt that he is guilty.
>
> Now, what is a reasonable doubt? First of all, let me tell you what it is not. A reasonable doubt is not some imaginary doubt or some slight doubt or some fanciful doubt that you might have. A reasonable doubt is, simply stated, a doubt for which you can give a reason. It is a substantial doubt; therefore, in viewing the evidence and the testimony that you have heard, from that testimony or evidence, or from the lack of testimony or evidence, if you have a reasonable doubt as to whether or not he is guilty on either of these charges, you have to find him not guilty.
>
> On the other hand, if you do not have a reasonable doubt in your mind, you have a duty to find him guilty.

(Tr. p. 4188, ll. 4-22). (J.A. p. 439). (Emphasis added).

The instruction on circumstantial evidence included the following:

> I charge you further that the mere fact that the circumstances are strongly suspicious and the defendant's guilt probable, is not sufficient to sustain a conviction, because the proof offered by the state must exclude every other reasonable hypothesis except the guilt of the accused and must satisfy you beyond a reasonable doubt.
>
> The two phrases, beyond a reasonable doubt and proof to a moral [certainty], are synonymous and the legal equivalent of each other. These phrases connote, however, a degree of proof distinguished from an absolute [certainty]. The reasonable doubt that the law in its mercy gives [to] the benefit of the accused is not a weak or a slight doubt, as I told you earlier, but a serious or strong and well founded doubt as to the truth of a charge.
>
> Now, I charge you further, ladies and gentlemen of the jury, that you must be convinced as I told you earlier that every circumstance relied upon to prove the guilt of the accused must be beyond a reasonable doubt. I have always likened circumstantial evidence to a chain where you have different links and that chain is put together. Each chain [sic] in that link [sic] must be consistently perfect or else it won't pull anything. So each circumstance relied on by the state must be consistently perfect and point to the guilt of the accused beyond a reasonable doubt.

(J.A. pp. 444-445). (Emphasis added).

In the instant case, the term "substantial doubt" was used to contrast "whimsical" or "imaginary" doubt, two phrases that clearly do not equate with "reasonable" doubt."[2] Clearly, a reasonable juror, as previously determined by the panel, would understand the phrase to conclude that a "reasonable doubt was not an unreal, idle, or imagi-

[2]As defined in Webster New World Dictionary 2nd College Edition (1976), the term "whimsical" means full of or characterized by whim or whimsy [a sudden fancy, idle and passing notion, capricious idea or desire] and the term "imaginary" means "existing only in the imagination; fanciful, unreal."

nary doubt, but rather a doubt that one is able to justify and draw a conclusion about soundly.[3] Simply put then, the definition by the trial court in the Gaskins case would not have misled the jury to lessen the state's burden when they act with "commonsense understanding." Boyde, supra, at 1198.

Further, the phrase "a serious, strong, or well-founded doubt" as a contrast to a weak or slight doubt, would not be construed by reasonable jurors to lessen the burden of proof in light of the context given. Here, the phrase did not destroy the jury's overall concept of reasonable doubt viewing the instruction as a whole. Here, the instruction properly advised the jury and "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime for which he stands charged." Winship, supra, 397 U.S. at 364.

In the Fourth Circuit decision, the Court properly acknowledged that in some instances the trial court's charge on reasonable doubt may so alter the self-evident meaning of reasonable doubt that the jury is misled by the instruction thereby violating due process, citing its own decision in U.S. v. Moss, 756 F.2d 329, 333 (4th Cir. 1985). Certiorari is not necessary where the lower court has properly applied

[3]According to Webster's New Collegiate Dictionary the term "substantial" means "1. of or having substance; 2. real, actual, true, not imaginary."

the correct constitutional standard to the challenged phrases.

The Petitioner relies upon the recent per curiam decision in Cage v. Louisiana, ___U.S.___, 111 S.Ct. 328 (1990), which was entered after the opinion of this Court involving a direct appeal rather than habeas corpus. In the second portion of the argument, we submit that Petitioner's interpretation of Cage creates "new law not applicable in collateral review." We would further submit that Cage is also factually distinguishable. In Cage, the phrase "it must be such doubt as to rise to a grave uncertainty," to define reasonable doubt was used. This phrase is not included in Gaskins' instruction and lacks the common sense understanding of reasonable doubt which Gaskins' instruction included. In Gaskins, the restrictive definition of reasonable doubt did not suggest prove beyond a "grave uncertainty" was sufficient. Rather, properly stated in the context given, it required proof beyond a reasonable doubt to convict. Further, contrary to the position taken, the Court's Order in Cage did not find error in contrasting reasonable doubt as "founded upon a real, tangible basis" and not upon "mere caprice and conjecture." Also, in Gaskins, the jury's burden on doubt was directed to doubt "from that testimony or evidence or from the lack of testimony or evidence," (J.A. p. 439), which was the evidentiary certainty missing in Cage. Further, not included in Cage, which ameliorates

any other interpretation, Judge Laney instructed that suspicion or probability is not enough to convict because "the state must exclude every other reasonable hypothesis except the guilt of the accused and must satisfy you beyond a reasonable doubt." (J.A. p. 444). This phrase is certainly consistent with a reasonable juror's concept of reasonable doubt. Accord Smith v. Bordenkircher, supra.
See Lord v. State of Nevada, ___P.2d___, 1991 Westlaw 13535 (Nev. February 7, 1991) (approves instruction that reasonable doubt may be "actual and substantial"). Idaho v. Rhodes, ___P.2d___, 1991 Westlaw 15607 (Idaho, February 13, 1991).

The Petitioner further urges that this error is exacerbated by the prosecutor's closing argument wherein he "predicted and stressed the erroneous instructions." Petition, p. 10. As the Court recognized in Boyde, supra, 110 S.Ct. at 1200, prosecutorial arguments "are likely viewed as statements of advocates" whereas jury instructions "are viewed as definitive and binding statements of the law." The argument must be judged in the context in which they are made. Boyde, supra. Here, the prosecutor spoke of reasonable doubt as a substantial doubt and not imaginary or fanciful and told the jury to remember what Judge Laney told them about reasonable doubt. (J.A. pp. 364-365). If that was an argument which misstated the law, it was subject to objection and correction by the Court. Greer v. Miller, 483

U.S. 756, 765-6 (1987). The Solicitor's brief reference to a "substantial doubt" as not imaginary or fanciful did not have its most damaging meaning as suggested by Petitioner and this Court should not infer such. Boyde, supra, at 1200, Donnelly v. DeChristoforo, 416 U.S. 637, 647 (1974). His assertion to the contrary must be rejected. Certiorari review is not warranted.

II. The Petitioner's interpretation of Cage v. Louisiana would create a "new rule" which should not be applied in habeas corpus to final cases.

The Petitioner contends that the mere use of the words "substantial," "strong," or "serious" alone may require reversal. (Petition, pp. 8-12). If Cage, supra, is interpreted by the Court to suggest that, it must be barred under the Teague v. Lane, 489 U.S. 288 (1989), standard as a "new" constitutional rule of criminal procedure that does not apply retroactively to cases on federal habeas corpus review. Recently, in Butler v. McKellar, 110 S.Ct. 1212 (1990), the Supreme Court held that a Teague "new rule" will not be applied on habeas corpus review where the outcome "was susceptible to debate among reasonable minds" among jurists and is not dictated by existing precedent. Butler, supra, 110 S.Ct. 1217. Accord Sawyer v. Smith, ___U.S.___, 110 S.Ct. 2822, 2827 (1990). Clearly, the position espoused by the Petitioner was clearly not dictated by the precedent

of the United States Supreme Court.[4]

First, in Taylor v. Kentucky, 436 U.S. 478, 488 (1978), the Court discussed a similar definition of "reasonable doubt as a substantial doubt, a real doubt" and stated "this definition, though perhaps not in itself reversible, often has been criticized as confusing." Also, Holland v. U.S., 348 U.S. 121 (1954). Further, certain members of the Court dissented to petitions for certiorari in direct appeals from South Carolina convictions and commented on these claims. Butler v. S.C., 459 U.S. 932 (1982) (Marshall, J., dissenting from denial of certiorari); Adams v. S.C., 464 U.S. 1023 (1983) (Marshall, J., dissenting from denial of certiorari). It is further clear that certain federal courts, including this Court, have not accepted the per se treatment Petitioner now suggests. Smith v. Bordenkircher, supra, Gaskins v. McKellar, supra; U.S. v. Magnano, 543 F.2d 431, 437 (2nd Cir. 1976) (substantial not shadowy); U.S. v. Christy, 444 F.2d 448 (6th Cir. 1971) (reasonable, substantial); U.S. v. Gratton, 525 F.2d 1161, 1162 (7th Cir. 1975) (substantial rather than speculative); U.S. v. Rodriquez, 585 F.2d 1234, 1241 (5th Cir. 1978) (same); Darnell v.

[4]In his Petition, Gaskins contends that since we failed to assert a non-retroactivity argument in the lower court, we have waived our right to present it herein, citing Hanrahan v. Greer, 896 F.2d 241 (7th Cir. 1990). Hanrahan is not applicable because Cage was decided after the panel decision and Respondents were successfully contending the instruction complied with prior decisions of the Fourth Circuit, Smith v. Bordenkircher, 718 F.2d 1273 (4th Cir. 1983). This is the first opportunity to assert it.

Swinney, 823 F.2d 299 (9th Cir. 1987) ("actual, substantial"). In Holland v. U.S., 348 U.S. 121 (1954), the Court suggested a definition for reasonable doubt as "the kind of doubt that would make a person hesitate to act."

In addition to the constant affirmation of similar instructions in South Carolina and Louisiana courts, the following state courts have rejected similar challenges: State v. MacDonald, 571 P.2d 930 (Wash. 1977); State v. Davis, 482 S.W.2d 486 (Mo. 1972); Smith v. State, 547 S.W.2d 925 (Tenn. 1977). Clearly, the issue raised herein, under the Petitioner's interpretation of Cage, a state court considering Gaskins' claim at the time his conviction became final (1983) would not have felt compelled by existing precedent to conclude that the rule Smart seeks was required by the Constitution. See Saffle v. Parks, 110 S.Ct. 1257, 1260 (1990). Respondents further submit that the Teague exceptions clearly have no applicability to this case. Henderson v. Smith, 903 F.2d 534, 539 (8th Cir. 1990); Zettlemoyer v. Fulcomer, 923 F.2d 284 (3rd Cir. 1991).

The Petitioner contends that Yates v. Aiken, 484 U.S. 211 (1988), is analogous to this situation. Clearly, his analysis is not accurate. Cage, for the first time, held that a definition of reasonable doubt given the case including the use of the word "substantial" in context with other terms deprived a defendant of due process. In Winship, supra, the Court held that the reasonable doubt stan-

dard was constitutionally applicable to juvenile cases as well as adult cases. When given the opportunity to establish the Cage issue in Taylor v. Kentucky and Holland, the Court declined to do so. That is far different from the Yates situation, which held that Sandstrom v. Montana, 442 U.S. 510 (1979), was the same as Francis and fully applicable to Yates conviction which occurred subsequent to Sandstrom. Like the situation in Butler and Saffle, the challenge to the trial judge's attempt to remove the jury's decision from whim and caprice in its instructions did not violate the constitution or precedent of the Court as it existed at the time of trial. Certiorari solely based upon the intervening decision in Cage v. Louisiana, supra, should be similarly denied.

III. The Eighth and Fourteenth Amendments were not violated in the sentencing phase of Petitioner's 1983 murder trial when a witness testified that the death sentence for an earlier and unrelated murder conviction had been vacated and the reasons for not seeking the death penalty in another case.

The Fourth Circuit, as well as the lower courts, properly concluded the sentencing phase testimony of a former prosecutor and the jury instructions using the word "recommend," did not diminish the jurors' responsibilities for determining the imposition of the death penalty in violation of Caldwell v. Mississippi, 472 U.S. 320 (1985).

Gaskins, 916 F.2d at 953. Also (J.A. pp. 1132-1145, 1191-1195, 1321-1322, 1328-1329). Respondents submit these decisions applied appropriate constitutional standards and certiorari review is not warranted.

In Caldwell v. Mississippi, 472 U.S. 372 (1985), the Supreme Court held that it was constitutionally impermissible for a death sentence to rest on a determination made by a sentencer that the responsibility for the appropriateness of Caldwell's death sentence to rest elsewhere. There, the prosecutor told the jury that "your decision is not the final decision ... your job is reviewable ... the decision you render is automatically reviewable by the Supreme Court ...." Caldwell, 472 U.S. at 325. The Court concluded that because the jury's sense of responsibility for determining the appropriateness of death was minimized by the prosecutor's closing argument and might so affect the fundamental fairness of the sentencing proceeding as to violate the Eighth Amendment.

The Court recently returned to the Caldwell issue in Dugger v. Adams, 489 U.S. 401 (1989), 109 S.Ct. 1211 (1989). In Dugger, the Court stated that "if the challenged instructions accurately describe the role of the jury under state law, there is no basis for a Caldwell claim. To establish a Caldwell violation, a defendant necessarily must show that the remarks to the jury improperly described the role of the jury assigned by local law." Dugger v. Adams,

supra, 109 S.Ct. at 1215.

In the case before this Court, there was no Caldwell violation. The Petitioner first complains about the testimony of former Solicitor T. Kenneth Summerford. He was permitted to testify at the penalty phase of Petitioner's trial that Gaskins had previously been sentenced to death in 1976 for the death of Dennis Bellamy. (J.A. pp. 543-544). Additionally, he was permitted to testify that the South Carolina Supreme Court had subsequently declared the death penalty statute under which Petitioner had been sentenced unconstitutional and, therefore, had vacated his death sentence and imposed a sentence of life imprisonment. (J.A. p. 544). Finally, Summerford was permitted to explain why he had decided to permit Petitioner to enter into a plea bargain agreement for a life sentence in connection with the death of Johnny Knight and others in 1978, when it was determined that he could not seek the death penalty. (J.A. p. 544).

The state court concluded that the testimony was "relevant to the sentencing determination because it relates to Gaskins' record of prior criminal convictions for murder. Testimony concerning prior criminal convictions is admissible as additional evidence during the sentencing phase of a capital case," citing State v. Plath, 281 S.C. 1, 313 S.E.2d 619 (1984). State v. Gaskins, supra, 326 S.E.2d 144. Further, the state court concluded the testimony factually

apprised the jury of the criminal record and outcome of those prosecutions. As the court stated: "Nothing in his testimony can be construed as an attempt to minimize the jury's responsibility in imposing a sentence. Also, nothing in his testimony indicated Summerford's personal opinion about the decision of seek the death penalty in the present case." Id.

Further, as a result of the searching examinations of the jurors who sat for Gaskins' trial, these jurors could not have reasonably believed that their sentencing verdict was only a technicality that would be set aside if a properly constituted authority disagreed with their verdict as was suggested in Caldwell. The testimony of Mr. Summerford may have tended to divert the jury's attention, because of the disagreement over whether Gaskins could have received the death penalty for the two killings triable in Summerford's circuit that occurred in October, 1975, but the diversion, if any, could have only been temporary. In retrospect, it is plausible argument to say that it would have been preferable if the prior death sentence had not been mentioned, but that development, and Gaskins' later decision to confess his crimes and plead guilty, were the factors of the major statutory aggravating circumstance relied upon by the state in seeking the death penalty for Tyner's murder. As the South Carolina Supreme Court stated, Summerford's testimony was relevant to the sentencing determination for that rea-

son, and the reversal of Gaskins' prior death sentence is a matter of public record. Id.

Next, the Petitioner complains that the trial judge's use of the term "recommend" in his sentencing instructions created a Caldwell error by misleading the jurors in their role. For the reasons stated in the lower courts, we submit that this issue lacks merit.

The South Carolina capital sentencing statute, South Carolina Code Ann., Section 16-3-20(C) (1990 Cum. Supp.), uses the term "recommendation" when referring to the jury's verdict in the sentencing phase of a trial. In State v. Linder, 276 S.C. 304, 278 S.E.2d 335 (1981), the trial judge was asked to explain to the jury that its recommendation of sentence would be binding. The request was denied, and on appeal, the South Carolina Supreme Court held the denial was not error. In State v. Linder, 278 S.E.2d at pages 338-339, the court stated:

> Use of the word "recommend" by the trial judge or solicitor is not per se suspect. Under the statute "recommendation" is the term applied of the jury's function at this phase of the trial. To instruct the jury that it will recommend what sentence the convicted murderer will be given is not improper and does not mask the true nature of the [jurors'] responsibility at this phase of the trial.

Under South Carolina law, the jury's sentencing recommendation is binding on the trial judge, but if the recommendation is for death, prior to imposing the sentence the trial judge must find as a fact whether it "was warranted under

the evidence of the case and was not the result of prejudice, passion, or any other arbitrary factor." Section 16-3-20(C) (1988 Cum. Supp.). State v. Gilbert, 273 S.C. 690, 258 S.E.2d 890 (1979) (prosecutorial comment about reviewing of death sentences improper).

Voir dire examination of the jurors seated in the trial reveal that each was aware of the binding nature of their decision. When the voir dire examinations of the twelve jurors who returned the death verdict are viewed, it can be seen why Gaskins' defense attorneys did not ask Judge Laney to instruct these jurors that their verdict would be binding as to the sentence Gaskins would receive, and why the attorneys also registered no objection to Judge Laney's use of "recommendation" when speaking of the verdict in his instructions. Every one of these twelve jurors was told, in one manner of speech or another, and with one degree of emphasis or another, that their verdict would represent the sentence to be imposed upon Gaskins. These incidents during their voir dire examinations are noted here for the convenience of the court in checking through the voluminous transcript of the jury-selection process.

The very first juror selected, Rosa L. Jacobs, received the least emphatic description of the jury's role in fixing sentence. Judge Laney used the word "recommend" once (Tr. p. 272, l. 1)., but Mr. Young, in examining Ms. Jacobs for Gaskins, asked her if she could vote to "give" or

not "give" Gaskins the death penalty. (Tr. p. 285, ll. 8-9). Every juror selected after Ms. Jacobs was advised repeatedly in questioning that the jury's role was to fix Gaskins' sentence if he should be found guilty of murder in the first phase of the trial. (See Magistrate's Report, J.A. pp. 1137-1142, summarizing the voir dire responses).

It can be seen from the record that Gaskins' attorneys, and Gaskins himself, could have entertained no realistic concern at tall that Judge Laney's use of the statutory term "recommendation" in his instructions to the sentencing jury would have led the jury to ignore its role by returning a verdict its members thought would be nonbinding. The jurors who answered the questions on their individual voir dire examinations were made clearly aware that their role was not that to merely recommend. The record thus reveals why there was no exception made to Judge Laney's use of the statutory term in explaining the sentencing verdict. Wainwright v. Witt, 469 U.S. 412, 435 (1985) (no reason for counsel to object where propriety in entire record so clearly perceived by all counsel present there was no reason to question the judge's instruction). Therefore, because of the absence of an indication that either Judge Laney or the prosecutors misled the jury as to its full responsibility under South Carolina law to determine Petitioner Gaskins' sentence, certiorari on this issue is not warranted. Similarly, the arguments of both the defense

counsel and prosecutor stressed that the sentence would be their decision.[5]

Clearly, there was no Caldwell error. Gaskins can point to no references by the prosecution or the trial judge concerning death sentence review in this case. Further, no where in this case did anyone imply that the jury's recommendation was non-binding as in Caldwell. Clearly, this jury was properly aware of its sentencing responsibility. Gaskins' present assertion is without merit.

IV. The instructions on implied malice given in the guilt phase of Gaskins' murder trial in 1983 were harmless beyond a reasonable doubt.

In his final assertion why certiorari should be

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[5]In closing arguments, Gaskins and both his attorneys told the jury they were seeking to have Gaskins' life spared. Mr. Young argued first. He referred of the indictment as a "death warrant" (Tr. p. 4380), said he was asking that Gaskins' life be spared (Tr. p. 4383), told the jury the State wanted it "to kill" Gaskins (Tr. p. 4381), and referred to the contingency of a "vote to fry Pee Wee Gaskins" (Tr. p. 4382). Gaskins told the jury he was asking for his life (Tr. p. 4384). Mr. Swerling told the jury that Gaskins asked for a jury trial so a jury could decide his sentence rather than a judge (Tr. p. 4393). He also said he was asking the jury for Gaskins' life (Tr. p. 4397 and p. 4405), and at one point said the jury by its verdict would decide whether "to kill a man" (Tr. p. 4399). The defense argument also reminded jurors of their answers to questions on voir dire.

The prosecutors made no comments that would mislead the jury, either. Mr. Anders referred to "passing penalty" upon Gaskins (Tr. p. 4372), and asked the jury to sign the verdict to "give Mr. Gaskins what he deserves, the death penalty." (Tr. p. 4374). Mr. Harpootlian reminded the jurors that during their voir dire examinations they had indicated they could "give a death sentence" under the proper circumstances, and could "impose the death penalty". (Tr. p. 4375). He later again said the jury should "consider the imposition of the death penalty" (Tr. p. 4376), and urged each juror to "decide that [Gaskins] will die in the electric chair." (Tr. p. 4379).

granted, Gaskins contends that the lower courts' harmless error analysis cannot withstand analysis was incorrect because the evidence was not "overwhelming." In the habeas proceedings in the District Court and Court of Appeals, each concluded that the alleged constitutional error was harmless beyond a reasonable doubt. (J.A. pp. 1326-1327). Gaskins v. McKellar, supra, 916 F.2d at 951-952. Particularly, the Fourth Circuit applied the harmless error issue as follows:

> Here, the jury necessarily found by its guilty verdict that Gaskins had murdered Tyner with a bomb Gaskins had built from electronic components in his cell and a piece of dynamite he received in the mail, so it is difficult to see how the jury could not have concluded, even without the presumption, that the killing was done "with malice." Aside from the raw circumstances of the killing, transcripts of conversations between Gaskins and Jack Martin (the intermediary who procured Tyner's murder) constitute further overwhelming evidence of malice. We therefore can say "'beyond a reasonable doubt that the jury would have found it unnecessary to rely on the presumption.'" Id. [Citing Rose v. Clark, 478 U.S. 570, 583 (1986).

Gaskins, supra, 916 F.2d at 952. Also (J.A. pp. 1326-1327). Respondents submit that certiorari is not necessary where the lower federal courts applied the appropriate constitutional standards to the unique facts of Mr. Gaskins' case.

Assuming as we must in the current procedural posture of this case that the use of the phrase "while malice is presumed form the use of a deadly or dangerous weapon ... where circumstances relating and surrounding the incident are brought out, then the presumption vanishes and malice again must be proven to you beyond a reasonable

doubt" was not only a violation of a state law mandate in State v. Elmore, 279 S.C. 417, 308 S.E.2d 781 (1994), but also we must assume a federal constitutional violation since it was so determined by the lower courts which we are not presently cross-petitioning on, we submit that it was harmless beyond a reasonable doubt. Rose v. Clark, 478 U.S. 470 (1986); Connecticut v. Johnson, 460 U.S. 73 (1983) (execution style killing may be harmless error). In Rose v. Clark, supra, the Supreme Court held that the harmless constitutional error standard of Chapman v. California, 386 U.S. 18 (1967), applied to burden-shifting jury instructions which violate Sandstrom v. Montana, 442 U.S. 510 (1979). Accord Pope v. Illinois, 481 U.S. 497 (1987). In Rose, the court stated:

> 'Chapman mandates consideration of the entire record prior to reversing a conviction for constitutional errors that may be harmless.' [citations omitted]. The question is whether, 'on the whole record ... the error ... [is] harmless beyond a reasonable doubt.' [citations omitted]. ... [I]n cases of Sandstrom error, 'the inquiry is whether the evidence was so dispositive of intent that a reviewing court can say beyond a reasonable doubt that the jury would have found it unnecessary to rely on the presumption.

Rose, 478 U.S. at 583. See U.S. v. Frady, 456 U.S. 152 (1982); Pope v. Illinois, supra; Lancaster v. Newsome, 880 F.2d 362 (11th Cir. 1989); Rodriquez v. Young, 906 F.2d 1153 (7th Cir. 1990).

Here, the Petitioner contends that there was not harmless error because evidence of his malice was not over-

whelming and the primary evidence of malice came from several murderers. Such comment defies a reasonable review of the record. In all of the arguments everywhere advanced by Gaskins about Judge Laney's instructions to the jury concerning malice, and in the decision of the South Carolina Supreme Court, no specific mention has been made of the fact that Judge Laney also explained express malice. At Tr. p. 4190, 11. 9-18, he instructed the jury as follows:

> I charge you that the words expressed or implied do not mean different kinds of malice, but merely the manner in which malice can only be shown to you; that is, either by positive evidence or by inference. Expressed malice is where one person kills another with a sedate, deliberate mind formed design -- such formed design being evidenced by external circumstances disclosing the inward intention of that person. It may be expressed, for example, where there are previous threats, where there is a lying in wait, or other circumstances showing directly an intent to kill
> ....

This definition of express malice has been approved of express malice has been approved by this Court in Sparf and Hansen v. U.S., 156 U.S. 51, 60 (1895), and properly states the common law in South Carolina. State v. Petsch, 43 S.C. 132, 135-136 , 20 S.E. 993, 994 (1894); State v. Lee, 79 S.C. 223, 60 S.E. 524 (1908). See 40 C.J.S. Homicide Section 16.

It has been stated that a Sandstrom error on intent (or malice) may be harmless where the intent to kill is conceded by the defendant or otherwise not put in issue at trial. Tucker v. Kemp, 762 F.2d 1496, 1501 (11th Cir.

1985) (en banc), cert. denied, 478 U.S. 743 (1986) (erroneous instruction on intent harmless where "sole defense was non-participation in the killing). Also, a Sandstrom error may be harmless where the evidence of his guilt is so overwhelming as to make inclusion of the erroneous instruction irrelevant to the outcome of the jury verdict. Dick v. Kemp, 833 F.2d 1448, 1453 (11th Cir. 1987). In deciding whether the evidence was overwhelming, the crucial inquiry may relate to whether or not there exists overwhelming evidence of intent (or malice), rather than the more inclusive question of guilt.

Here, Gaskins' malicious intent is expressively overwhelming in the record. Here, the jury found Gaskins guilty of the murder of Tyner under the circumstances of execution previously set forth in the Statement of the Case. The jury also had before it evidence of Gaskins' attempt to poison Tyner. After he had failed in his effort to kill Tyner by poisoning, he talked to his co-conspirator Tony Cimo in an introduced recorded conversation as follows:

> Gaskins: It just make 'em sick as hell and that's it. So, I come up with something told him [Referring to Gerald McCormick] that I would call you, if you wanted me, and tell you if you'll send it, it can't be no damn making sick on it. I need -- one electric cap and as much of a stick of damn dynamite as you can get. I'll take a damn radio and rig it into a bomb to where he plugs it up, that son of a bitch'll go off and it won't be damn coming back on that.
>
> ....
>
> Gaskins: That's about the best way that I can

figure to get him. Because everything we get him just looks like it just makes him sick as hell and that's it. But one electric cap and as much of a stick you can get in as pure as you can get it, he told me to call you and maybe over the weekend you can find one stick somewhere and get it to me and damn if I can't fix him up.

(Tr. p. 4495). The telephone conversations reveal similar expressions of malice against Tyner by Gaskins concerning his design to kill him:

> Tr. 4498 Get me enough to do that damn job and listen for the bang.
>
> Tr. 4502 That's enough [drug] to bust his heart.
>
> Tr. 4503 When that thing melts in his belly, that's "Katie bar the door."
>
> Tr. 4521 The next night after I get it [i.-e., poison] ... that son of a bitch'll be laid out.
>
> Tr. 4522 After I've got it ... the next night, you'll know that son of a bitch is on his way to hell.
>
> Tr. 4522 I want to get him and get him on out of here.
>
> Tr. 4522 That's a hell of a hard nigger to get rid of.
>
> Tr. 4523 When I get some, ... then you'll know the next night he's got it.

Further, in the prosecution's closing argument, the prosecution did not argue that malice can be presumed. The Assistant Solicitor, Mr. Harpootlian, argued premeditation by Gaskins and pointed to Gaskins' conversations with Jack Martin as evidencing "twenty-five minutes worth" of an intent to kill Rudolph Tyner. (Tr. pp. 4118, 4125). Com-

pare Hyman v. Aiken, 824 F.2d 1405 (4th Cir. 1987) (no harmless error under similar instruction where prosecutor in argument urged the erroneous presumption).

Here we are faced with an execution style murder of Rudolph Tyner. Under the evidence presented in his 1983 trial the jury did not have to rely upon any presumption of malice to find both Gaskins' heart, and his expressly revealed plans to kill Tyner, as laden with malice as the speaker he rigged and the drugs he gave Tyner were laden with materials fashioned to end Tyner's mortal existence without due process of law. Reviewing the trial record as a whole, U.S. v. Hasting, 461 U.S. 499, 509 (1983), any court can confidently ascertain that malice was overwhelmingly established by these expressions in the trial record that a jury would have found it unnecessary to rely on the "presumption." Rose, 478 U.S. at 583. Just as the jury found the prisoner guilty in Frady, supra, could have found "malice aplenty," (456 U.S. at 171) and "not only ... malice, but premedita[tion] and deliberate intent," the jury which found Gaskins guilty heard and saw overwhelming evidence of malice. Further, there is no "reasonable likelihood" the jury was affected by Judge Laney's instructions on implied malice, in light of his instructions on malice and express malice and the conclusive evidence of malice in this record. Boyde v. California, ___U.S.___, 110 S.Ct. 1190 (1990). See Myrick v. Mashner, 799 F.2d 642 (10th Cir. 1986) (erroneous

charge harmless error where actions as aider and abettor sufficiently showed intent). McKenzie v. Risley, 801 F.2d 1519, 1526 (9th Cir. 1986) (violent torture -- murder presents overwhelming evidence of intent to be harmless error); Beck v. Norris, 801 F.2d 242 (6th Cir. 1986) (defense of non-participation leads to harmless Sandstrom errors). Further delay into the finality of these proceedings is unnecessary in light of the record before this Court.

CONCLUSION

For each of the foregoing reasons, Respondents request that the Petition for Certiorari be denied.

Respectfully submitted,

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Attorney General

DONALD J. ZELENKA
Chief Deputy Attorney General

ATTORNEYS FOR RESPONDENTS

By: Donald J. Zelenka

April 16, 1991
Columbia, South Carolina

IN THE SUPREME COURT
OF THE UNITED STATES

No. 90-7469

October Term, 1990

DONALD HENRY GASKINS,

Petitioner,

versus

KENETH D. MCKELLAR, WARDEN, SOUTH CAROLINA DEPARTMENT OF CORRECTIONS, AND THE ATTORNEY GENERAL OF SOUTH CAROLINA,

Respondents.

AFFIDAVIT OF SERVICE

PERSONALLY appeared before me, Donald J. Zelenka, who being duly sworn, deposes and says that he served the foregoing Brief in Opposition to Petition for Writ of Certiorari on the Petitioner by depositing one copy of the same in the United States mail, first-class postage prepaid, and addressed to John H. Blume, Esquire, P. O. Box 11311, Columbia, South Carolina 29211. He further certifies that all parties required to be served have been served.

This 16th day of April, 1991.

Donald J. Zelenka

SWORN to before me this
16th day of April, 1991.

Frances A. Cowan (LS)
Notary Public for South Carolina

My Commission Expires: 4-14-97

The State of South Carolina

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April 16, 1991

Honorable William K. Suter
Clerk, United States Supreme Court
1 First Street, N.E.
Washington, D.C. 20543

Re: Donald Henry Gaskins v. McKellar et al.
No. 90-7469

Dear Mr. Suter:

Enclosed please find the original and ten copies of Respondents' Brief in Opposition to Petition for Writ of Certiorari for filing in the above action.

Sincerely,

Donald J. Zelenka
Chief Deputy Attorney General

bbb
enclosures
cc: John H. Blume, Esquire
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